Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin and Remy

From: Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel
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Subject: Discussion of Independent Expenditures

Date: August 24, 2006

Introduction

The term "independent expenditure" is defined by the Act[1] at section 82031, as follows:

> "'Independent expenditure' means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee."

The term is further defined at regulation 18225(b); both statute and regulation are consistent with federal definitions of the same term. Campaign spending of this sort has given rise to a lengthy history of litigation, but for the past decade independent expenditures have declined in national importance as state and federal campaign committees exploited alternative forms of independent campaign speech that escape regulation by avoiding "express advocacy," which is a critical element in the defining statutes.[2] With the Bipartisan Campaign Reform Act of 2002, Congress defined a new form of campaign advocacy, "electioneering communications," that enables the Federal Election Commission ("FEC") to regulate new varieties of independent advocacy, but the California legislature has not yet followed suit with a similar provision.

The classic "independent expenditure" is a payment, not coordinated with or requested by the candidate, for a campaign advertisement saying "Vote for Candidate X." As long as the payment is an "expenditure" as defined at section 82025, is "independent" of Candidate X, and expressly advocates a particular choice by voters – in the form of an imperative verbal expression like "vote for" or "support" – the person or persons who paid for the advertisement have made a reportable "independent expenditure." As will be seen on the following page, these reports offer the voters a great deal of timely information on the advertising campaign that is often lacking in other forms of independent ad campaigns.

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[1] Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations.

[2] In March and May, 2003 staff presented memoranda detailing at some length the case law and campaign practices mentioned in this paragraph, which will not be repeated here.

Reporting Independent Expenditures

Under the Act's reporting provisions, candidates and committees must disclose all "expenditures" as defined in section 82025 and regulation 18225. For expenditures of $100 or more, the name and address of the payee and a description of the payment must be disclosed. (Section 84211(j) and (k).) For "independent expenditures," the date of the expenditure and the candidate or measure identified in the communication must also be disclosed.

For independent expenditures totaling $1,000 or more to support or oppose a *single* candidate or ballot measure, the committee[3] making the expenditure must file additional reports:

- A Supplemental Independent Expenditure Report (Form 465). (Section 84202.5.) This is filed on regular pre-election and semi-annual filing deadlines if $1,000 or more is spent to support or oppose a single candidate or ballot measure during the period covered by the report. The report is filed in the jurisdiction where the candidate or measure is being voted on to provide information about the expenditures to the voters in that jurisdiction. For example, if a state committee makes an independent expenditure of $1,000 or more to support or oppose a candidate for city council, the Form 465 is filed in that city.

- Late Independent Expenditure Report. (Section 84204.) This report is filed during the 16-day period before an election if independent expenditures of $1,000 or more are made to support or oppose a single candidate or measure being voted on in the election. This 16-day period begins the day after the closing date of the last pre-election campaign statement filed before the election. The report must be filed within 24 hours in the jurisdiction where the candidate or measure appears on the ballot.

- 90-day Election Cycle Report. (Section 85500.) This is filed during the 90-day period before any state election if $1,000 or more is spent to support or oppose a state candidate or a state ballot measure. It must be filed with the Secretary of State within 24 hours. The filing requirement is only applicable to state committees that have met the $50,000 contribution/expenditure threshold requiring electronic filing of campaign reports.

All three reports must identify the candidate or measure supported or opposed by the independent expenditure, along with the date and a description of the expenditure. The late independent expenditure report and the 90-day election cycle report also must contain information about contributions of $100 or more *received by* the filer since its last regular pre-election or semi-annual report was filed.

In addition to "independent expenditures" (properly so called), this memorandum will make reference to other kinds of expenditures involved in independent campaigns, a useful

[3] If not already a "committee," section 82013(b) provides that a person who makes independent expenditures totaling $1,000 or more in a calendar year becomes an "independent expenditure committee."

reminder that "independent expenditures" are only one of several kinds of campaign speech that are "independent" of campaigns run by candidates or measure proponents. If an expenditure on a campaign advertisement of *any* kind is made at the behest of a candidate or measure proponent, that is, if it is coordinated in any way with them or with their agents, the expenditure would not be "independent," and would be regarded under the Act as an "in-kind contribution," subject to very different rules than those that apply specifically to "independent expenditures."

The advent of contribution limits in a time of rapidly escalating investment in election campaigns has led to corresponding increases in the volume of independent campaigns. Neutral observers and opponents alike sometimes voice suspicions that an ostensibly "independent" advertisement may have been coordinated with a candidate or measure proponent. Such claims are disturbing because they point to a subversion of the law, but they require proof which can be difficult to gather – increasing concerns with the integrity of the electoral process. The subject of this memorandum, however, is limited to genuinely *independent* campaign activities.

The Increasing Popularity of "Issue Advocacy"

By the mid-nineties, campaign consultants began responding on a large scale to a convergence of two incentives inviting an increase in "issue advocacy," as distinguished from "independent expenditures." First, focus groups indicated a preference for messages that cast candidates in a favorable light on popular issues, but did not expressly tell recipients how to vote. Second, by courting voter preferences with the elimination of "express advocacy," these messages were no longer classified as "independent expenditures" subject to the reporting rules described earlier. As a result, advertisements like "Candidate X will cut your taxes" proliferate under the guise of "issue advocacy," thought to be largely exempt from disclosure requirements and other campaign regulations.[4] Thus while independent campaigns have increased in overall importance, "independent expenditures" account for a smaller percentage of such campaigns.

The primary reason that messages avoiding "express advocacy" were thought immune to disclosure rules was the Supreme Court's 1976 opinion that reviewed sweeping amendments to the Federal Election Campaign Act, which were enacted in the wake of the Watergate scandal.[5] The Supreme Court found an unconstitutional level of vagueness in the federal law's definition of campaign speech whose sources could be made subject to disclosure. Rather than overturning the defective statute, the high court imposed a "narrowing construction" that limited application of the statute to campaign speech that *expressly advocated* the election or defeat of a federal candidate – on the theory that "express advocacy" was not an unconstitutionally vague concept. In *The Governor Gray Davis Committee v. American Taxpayer Alliance*, 102 Cal.App.4th 449 (2002), the First District Court of Appeal issued a very similar "narrowing construction" of the Act's definition of independent expenditure. Because of that court's ruling, staff is currently taking a conservative position when faced with communications that otherwise bear all the

[4] Of course, both traditional "independent expenditure" and campaign "issue advocacy" messages have more negative forms, such as "Vote against Candidate X," and "Candidate X will raise your taxes."
[5] *Buckley v. Valeo*, 424 U.S. 1 (1976).

hallmarks of an independent expenditure, but for their avoidance of express advocacy. Staff advises that a communication is not an "independent expenditure" without express advocacy.

The predictable result of perceived "technicalities" that invite wholesale evasion of campaign disclosure rules is widespread cynicism among voters and, indeed, among persons who run election campaigns. But there are vital issues at stake in this area. Free and untrammeled speech on political issues, and the right to petition government, are indispensable engines of democracy, and are protected as such by the Constitution. Speech employed to influence election outcomes can be made subject to disclosure rules because there is a First Amendment interest in the full and fair evaluation of campaign speech, which is facilitated by disclosure of the persons and interests funding such messages. The interest in source disclosure is less urgent when the message concerns a matter of general public interest unconnected to an election contest, or is directed at a public official in an effort to secure some governmental action – a form of speech that includes "grassroots lobbying," which is protected by the right to petition government.

Thus the problem of regulating campaign speech is necessarily complicated by the need to distinguish genuine campaign speech from "issue advocacy" and "grassroots lobbying." Under present rules, independent ads such as: "Candidate X has ruined the environment; call Candidate X and tell him to change his act" are treated as "issue advocacy," not "independent expenditures."[6] Reporting duties that attach to "independent expenditures" do not apply.

New Rules

The same problems bedeviled federal campaigns until Congress took action in 2002 by, among other things, asserting its authority to compel disclosure of funding sources underwriting "electioneering communications." This new term introduced a requirement for disclosure of expenditures on (in simple terms) broadcast communications referring to a clearly identified federal candidate, publicly distributed within a certain time period prior to the election, to fifty thousand or more voters in the candidate's district. (*See* 2 U.S.C. 434(f)(3); 11 CFR 100.29).

"Electioneering communications" are not defined by details of language, but by factors which (apart from the required reference to a clearly identified candidate) are plainly external to the message. Importantly, the defining criteria designed by Congress have eliminated most of the uncertainty in determining which advertisements are "electioneering communications," insulating the rule from claims that it is unconstitutionally vague. The California Legislature has written a similar provision in section 85310, requiring disclosure of expenditures beyond a threshold amount for "Communications Identifying State Candidates." Like its federal cousin, section 85310 defines communications subject to its provisions by details of how and when the communication is published, rather than parsing the language it employs.

[6] Urging voters to "call" an officeholder is not express advocacy of a particular result in an election, and therefore such advertisements cannot be classified as "independent expenditures."

The Supreme Court heard vigorous challenges to the new electioneering communications rules in *Sen. Mitch McConnell et al. v. Federal Election Commission, et al.*, 540 U.S. 93 (2003). The court concluded that the criteria for defining the subject communications were not vague, and that the Constitution did not limit regulation of campaign speech to "express advocacy." While the majority found that Congress' new "electioneering communications" rules were not facially unconstitutional, the court did leave open opportunities for "as applied" challenges, acknowledging the possibility that the defining criteria of "electioneering communications" might be broad enough to sweep in some communications that were constitutionally protected from the disclosure burdens imposed by the new law. Such challenges have already been made, and the FEC has engaged in extensive rulemaking in this area. In fact, the FEC has noticed a meeting on August 29, 2006 for accelerated rulemaking on exceptions for "grassroots lobbying." It will clearly be some years yet before the permissible reach of "electioneering communications" has been settled.

This relatively recent federal legislation has broken new ground with a law that is free of the fundamental vagueness that was fatal to the attempt thirty years ago to discriminate between campaign advertising and genuine issue advocacy or grassroots lobbying. The *McConnell* opinion makes it clear beyond argument that "express advocacy" is not the sole constitutional measure of regulable campaign advocacy. Case-by-case litigation and federal rulemaking will in time establish the extent to which campaign reporting rules must incorporate exceptions to accommodate otherwise included communications that are not campaign-oriented.

As for California, section 82031 does not require that the Commission continue to abide by a readily-evaded "express advocacy" element in the definition of "independent expenditure." Section 82031 offers an alternative applicable to speech that "taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee." It would only be necessary for the Commission to find a way to promulgate an amendment to regulation 18225(b) that would apply *this* part of the statutory language to campaign communications lacking "express advocacy," but identifiable as independent campaign-related communications by other clear and objective criteria.

Staff cannot say at this stage whether such a regulation is practicable, and emphasizes that the federal statue is generating rapid developments in an area of law that has been neglected for thirty years. Any such project by the Commission would galvanize the regulated community to vigorous opposition, and then to litigation whose governing case law has not yet been written. But it seems clear that the Commission has at least constitutional and statutory authority to move beyond the bounds of express advocacy if it wishes to consider such an action in 2007.

Concluding Thoughts

Concern for freedom of expression on questions of public policy demands that any regulation of independent campaign speech err on the side of caution. Thus any rule that purports to distinguish genuine "issue advocacy" or "grassroots lobbying" from surreptitious campaign speech must always leave room for ambiguous cases. And yet the bounds of ethical conduct in political campaigns have merged with the line that marks the limits of legal conduct. Both voters and those who seek their votes now generally accept that any action not subject to prosecution is "ethical" conduct. The pressure of winner-take-all politics encourages contestants to venture into the grey areas in search of some advantage over an opponent. Rulemaking in this field is accordingly quite difficult. A regulation that errs on the side of caution, out of respect for First Amendment freedoms, invites the exploitation of "technicalities" that cannot be prevented.